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September 8, 2004

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, Second Floor
Boston, MA 02110

Re: D.T.E. 04-33 – Verizon's Petition for Arbitration

Dear Ms. Cottrell:

As Verizon Massachusetts ("Verizon MA") explained in its September 1st comments, the Department should promptly proceed with this arbitration to assure a swift transition to the permanent rules that the Federal Communications Commission ("FCC") plans to adopt after six months, and to give contractual effect to the *Triennial Review Order* rulings that were not affected by the *USTA II* mandate.[1] While various commenters[2] urge the Department to delay this arbitration until the FCC adopts

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1 Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded*, *United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

2 The following parties responded to the Department's August 23rd notice: AT&T Communications of New England Inc. ("AT&T"); Conversent Communications of Massachusetts, LLC ("Conversent"); Richmond Connections Inc., d/b/a Richmond Networx ("Richmond"); and, filing jointly, A.R.C. Networks, d/b/a InfoHighway Communications Corporation, Broadview Networks Inc. and Broadview NP Acquisition Corp., Bullseye Telecom Inc., Cleartel Telecommunications, Inc., f/k/a Essex Acquisition Corp., Comcast Phone of Massachusetts Inc., DIECA Communications Inc., d/b/a Covad Communications Company; DSCI Corporation, KMC Telecom V Inc., Spectrotel Inc. Talk America Inc., XO Communications Inc. and XO Massachusetts Inc. (hereinafter referred to as "Joint Parties") and ACN Communication Services Inc., CTC Communications Corp., DSLnet Communications, LLC, Focal Communications Corporation of Massachusetts, Lightship Telecom, LLC, LightWave Communications Inc. and PAETEC Communications Inc. (hereinafter referred to as "Joint CLECs").

permanent unbundling rules, this is contrary to the approach the FCC expressly approved in its *Interim Rules Order*.[3] Joint Parties' Comments, at 2; Joint CLECs' Comments, at 1-2.

First, the *Interim Rules Order* does not affect the *TRO*'s rulings delisting unbundled network elements ("UNEs"), including, among others, all enterprise switching. Rather, the transitional unbundling obligations in the *Interim Rules Order* apply only to those UNEs eliminated by the *USTA II* mandate; they do *not* affect any of the *TRO* rulings that were either affirmed in *USTA II* or not challenged on appeal. Because these rulings will not change as a result of the permanent rules, there is no reason to wait any longer, let alone months more, to arbitrate appropriate contract language to reflect them - particularly because the competitive local exchange carriers ("CLECs") have had almost a year to negotiate amendments implementing the *TRO* rulings.

Second, there is no reason to wait for final unbundling rules as to the UNEs affected by the *Interim Rules Order*, either. The FCC has "expressly preserve[d] incumbent LECs' contractual prerogatives to initiate change of law proceedings" in order to ensure a "speedy transition" to the FCC's permanent rules. *Interim Rules Order*, at ¶ 22. The FCC stated that proceedings such as this one are to "presume the absence of unbundling requirements for switching, enterprise market loops, and dedicated transport so long as they reflect the transition regime" established in the *Interim Rules Order*. *Id*. at ¶ 23. Accordingly, the *Interim Rules Order* not only allows, but explicitly encourages, the Department's prompt resolution of this arbitration.

Third, the *Interim Rules Order* provides no basis for the Department to issue a standstill order, as Conversent suggests. Conversent's Comments, at 5-7. The Department, like the majority of others states that have considered this question, has already declined to issue standstill orders.[4] Nothing in the *Interim Rules Order* calls any of those decisions into question.

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[3] Order and Notice of Proposed Rulemaking, *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, released August 20, 2004 ("*Interim Rules Order*").

[4] This includes California [Administrative Law Judge's Ruling Denying Motion, R.95-04-043, I.95-04-044, at 7 (Cal. Pub. Utils. Comm'n June 25, 2004)], Florida [Order on Motions To Hold in Abeyance, Docket No. 040156-TP, Order No. PSC-04-0578-PCO-TP, at 6 (Fla. Pub. Serv. Comm'n June 8, 2004)], Georgia [Order Dismissing Petition, Docket No. 18889-U (Ga. Pub. Serv. Comm'n June 1, 2004)], Louisiana [Minutes from Open Session at 4 (La. Pub. Serv. Comm'n June 9, 2004)], New Hampshire [Letter Ruling, DT 04-107 (N.H. Pub. Utils. Comm'n June 11, 2004)], New York [Ruling Granting Motions for Consolidation and To Hold Proceeding in Abeyance, Cases 04-C-0314 & 04-C-0318, at 7-8 (N.Y. Pub. Serv. Comm'n June 9, 2004)], North Carolina [Order Denying Emergency Relief, Docket No. P-100, Sub 133t, at 1-2 (N.C. Utils. Comm'n June 11, 2004)], Ohio [Entry on Rehearing, Case Nos. 03-2040-TP-COI *et al.*, ¶ 15 (Ohio Pub. Utils. Comm'n July 28, 2004)], Oregon [Order Denying Petition for Clarification,

To the contrary, the *Interim Rules Order* removed the claimed uncertainty about the FCC's intentions with regard to the *TRO* rulings that were not affected by the *USTA II* mandate. As noted, these rulings remain binding and effective, and should have been implemented many months ago. As to mass-market switching and high-capacity facilities, Verizon MA cannot, in any event, change the terms of their provision while the Interim Rules remain in effect. In any event, the broad, indefinite standstill that Conversent suggests would eliminate any incentive the CLECs might have to engage in serious commercial negotiations.

In its September 1st comments, Verizon MA stated that it would file by September 14th a revised *TRO* amendment to "reflect the transition regime" set forth in the *Interim Rules Order*. Verizon MA's Comments, at 4-5. Verizon MA proposes an additional 30 days of negotiations regarding that updated amendment for those parties remaining in the proceeding. By contrast, AT&T recommends a 60-day negotiation period following publication of the *Interim Rules Order* in the Federal Register. AT&T's Comments, at 4-5. The Department should reject AT&T's recommendation, which is designed solely to avoid – for as long as possible – the implementation of the FCC's rulings delisting UNEs. Indeed, a Texas Arbitrator last week rejected AT&T's proposal for a longer negotiating period, finding that Verizon's suggested 30-day period is reasonable and complies with the Telecommunications Act of 1996 and any contractual negotiation provisions, given that Verizon had filed its arbitration to implement the *TRO* rulings six months ago.[5]

If the parties do not reach agreement on an amendment at the end of 30 days, then arbitration will proceed on the issues identified as still in dispute. Going forward with the arbitration is the only approach consistent with the FCC's intent that "alterations [that] are approved or deemed approved by the relevant state commission may take effect quickly if our final rules in fact decline to require unbundling of the elements at issue." *Interim Rules Order*, at ¶ 22.

Regarding Verizon MA's August 20th Notice to Withdraw its Petition for Arbitration as to Certain CLECs, some parties argue that withdrawal should be denied

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ARB 531, at 6 (Or. Pub. Util. Comm'n June 30, 2004)], South Carolina [Open Meeting of Commission (S.C. Pub. Serv. Comm'n June 22, 2004)], Tennessee [Transcript of Authority Conference, Docket No. 04-00158, at 34-35 (Tenn. Reg. Auth. June 7, 2004)], Utah [Order Denying Joint CLEC Motion, Docket No. 03-999-04, at 2-3 (Utah Pub. Serv. Comm'n June 14, 2004)], Vermont [Order Re: Motion To Hold Proceeding in Abeyance Until June 15, 2004, Docket No. 6932, at 2-3 (Vt. Pub. Serv. Bd. May 26, 2004)], and Virginia [Order, Case No. PUC-2204-00073 and Case No. PUC 2204-00074 (Va. State Corp. Comm'n July 19, 2004)].

5 Petition of Verizon Southwest for Arbitration of an Amendment to Interconnection Agreements, Docket 29451, Ruling on Motion for Reconsideration or Clarification, at 4 (Tex. P.U.C. Sept. 1, 2004).

because it is untimely or otherwise deficient. AT&T's Comments, at 5-6; Joint Parties' Comments, at 2-3. Their arguments are unfounded.

Pursuant to specific terms in those interconnection agreements, Verizon MA is permitted, upon specified notice, to cease providing UNEs that are no longer subject to an unbundling obligation under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51. Thus, these agreements need not be amended in order to implement Verizon MA's contractual right to cease providing UNEs that were eliminated by the *Triennial Review Order* or the D.C. Circuit's *USTA II* decision. In those instances where Verizon MA no longer seeks relief from the Department to amend specific interconnection agreements, withdrawal of Verizon MA's Petition is plainly the appropriate course of action.

Under the Department's rules, a party may withdraw an initial pleading at any time prior to the commencement of a hearing. *See* 220 C.M.R. 1.04(4). There has not been a hearing in this proceeding, and Verizon MA is entitled to withdraw its Petition as a matter of right. Moreover, withdrawal of Verizon MA's Petition as to a majority of the CLECs will promote administrative efficiency by saving time, effort and resources. With fewer parties participating, there will be fewer issues presented for the Department's resolution, thereby simplifying the proceeding.

Some parties incorrectly claim that, by filing for arbitration, Verizon MA waived its contractual rights to cease providing UNEs upon notice once they are delisted. Joint Parties' Comments, at 2-3. But Verizon MA has not - and could not - forfeit its existing rights under its interconnection agreements by simply filing a Petition for Arbitration. To the contrary, the overwhelming majority of state commissions that have addressed the issue have reaffirmed that incumbent LECs continue to enjoy all rights under existing agreements whether or not there is a proceeding underway to amend them. *See supra* at 2-3 n.4. Moreover, Verizon MA specifically noted in its Petition – even though it did not have to – that it reserved its rights "under the terms of existing interconnection agreements to cease providing access" to UNEs "once applicable law no longer requires Verizon to provide" such access.[6] Verizon MA's Petition, at 2-3 n.4.

Likewise, contrary to parties' claims, Verizon MA's Notice for Withdrawal is not deficient because it did not discuss the specific terms of the various CLECs' interconnection agreements to demonstrate that they do, in fact, authorize Verizon MA to cease providing UNEs no longer required under federal law. Joint Parties' Comments, at 2-3. Verizon MA - the only petitioner in this proceeding – simply no longer seeks relief, and withdrew its Petition as matter of right. Although the Department does not need to address the issue because there is no contract enforcement dispute before it, if the

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[6] Notwithstanding any contrary suggestion in its Notice of Withdrawal, in withdrawing its petition for amendment with respect to most of the CLEC parties, Verizon MA does not concede that it has any obligation to negotiate amendments to its interconnection agreements with *any* party, including the parties remaining in the proceeding, before terminating the provision of network elements that are no longer subject to unbundling under federal law.

Department were to examine the terms of the specific interconnection agreements, it would find that they do, in fact, allow Verizon MA to cease providing access, upon notice, to items that are not UNEs under federal law. (That, of course, is why the parties objecting to withdrawal do not cite any of the language.)[7]

Finally, in an attempt to reargue the *USTA II* findings, Conversent requests that the "Department should dismiss, as a matter of law, any claim by Verizon that it is not obligated to provide access to unbundled DS1, DS3 and dark fiber high-capacity loops at TELRIC rates." Conversent's Comments, at 2. In an attempt to support its argument that high-capacity loops remain subject to an unbundling requirement, Conversent cites an FCC commissioner's dissenting statement to the *Interim Rules Order*, but ignores the holdings of *USTA II* and the majority's statements in the FCC's Order.[8]

The D.C. Circuit in *USTA II* clearly stated that it was vacating *all* of the FCC's delegations of impairment determinations to the states. *USTA II*, 359 F.3d at 568. In its *Triennial Review Order*, the FCC unquestionably made such a delegation in the context of both high-capacity loops and transport. *See Triennial Review Order* ¶¶ 327-328, 394. In addition, the D.C. Circuit defined the term "transport," as used in *USTA II*, to refer to "transmission facilities dedicated to a single customer," which the FCC defines as "loops," as well as to facilities dedicated to a "carrier," which the FCC defines as "transport."[9] *USTA II*, 359 F.3d at 573; 47 C.F.R. § 51.319(a), (e). The two substantive flaws identified by the D.C. Circuit with respect to the FCC's analysis of high-capacity facilities — considering impairment on a route-specific basis and the failure to consider the availability of special access, — apply equally to the FCC's determinations as to both loops and transport. *See USTA II*, 359 F.3d at 575, 577; *see also Triennial Review Order*, at ¶¶ 102, 332, 341, 401, 407. Indeed, the FCC's *Interim Rules Order* expressly assumes that the Court vacated the FCC's enterprise loop unbundling rules. *Interim Rules Order*, at ¶ 1 n. 4.

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[7] The pertinent language from each of the objecting parties' interconnection agreements is reproduced in an attachment to this pleading. Those agreements relieve Verizon MA, in the clearest possible language, of any obligation to provide access to any UNE that is not "required by Applicable Law" and specifically authorize Verizon MA to terminate such offerings upon prior written notice.

[8] In the alternative, Conversent argues that the Department should act pursuant to state law to require Verizon MA to continue offering these UNEs. Conversent's Comments, at 1, 7. As discussed in Verizon MA's Initial and Reply Comments to the Department's Briefing Questions in D.T.E. 03-60, the Department has no authority to impose unbundling requirements that have been eliminated pursuant to the *Triennial Review Order* or the *USTA II* mandate.

[9] In addition, the D.C. Circuit's treatment of high-capacity loops and transport in its *USTA II* decision was consistent with the manner in which the incumbents briefed the issue, by addressing both simultaneously. *See* Brief for ILEC Petitioners and Supporting Intervenor, at 31-35, Nos. 00-1012 *et al.* (D.C. Cir. filed Jan. 16, 2004); Reply Brief for ILEC Petitioners and Supporting Intervenor, at 15-17, Nos. 00-1012 *et al.* (D.C. Cir. filed Jan. 16, 2004).

In conclusion, the Department should not allow CLECs to misuse the *Interim Rules Order* to delay unnecessarily this arbitration. Almost a year ago, the FCC ordered carriers to promptly implement its *TRO* rulings; the *Interim Rules Order*, likewise, stresses the need to move forward with proceedings, like this one, that will establish a framework for a smooth transition to the FCC's new rules. Therefore, this arbitration should proceed with the carriers that Verizon MA has identified as remaining in the arbitration.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

/s/Barbara Anne Sousa

Barbara Anne Sousa

cc: Tina Chin, Esquire, Hearing Officer
Michael Isenberg, Esquire, Director – Telecommunications Division
April Mulqueen, Assistant Director – Telecommunications Division
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D.T.E. 04-33 Service List